

ANC 6B Updated Statement of Appeal 20549

November 2, 2021

Summary

This updated Statement of Appeal by ANC 6B incorporates a revised building permit (B2112156) related to the appeal of the original permit (B2103902), which was timely filed, later amended by the Board to incorporate the first revised permit (B2109853) and both the unrevised and altered Certificate of Occupancy (CO2102980). The updated statement furthers the allegations of errors based on the determinations made in the new revised permit. Some of the original allegations are moot due to the revisions, but others remain. The new allegations of errors by the Zoning Administrator relate to parking deficiencies and incorrect interpretations of existing nonconformities. The timeliness of each allegation is noted below.

For the ease of the board and planned hearing on December 1, 2021, we are requesting an amendment rather than filing a series of appeals for each individual sets of determinations.

Background

This updated Statement of Appeal ("Statement") is filed by Advisory Neighborhood Commission 6B ("ANC 6B"). This statement supersedes the statement in Exhibit 44 ("First Revised Statement") which itself superseded the statement in Exhibit 23 ("Original Statement"). This updated appeal is of Building Permit B2112156 ("Second Revised Permit", Tab A), B2109853 ("First Revised Permit", Exhibit 44A), building permit B2103902 ("Original Permit", Exhibit 3), Unrevised Certificate of Occupancy CO2102980 ("Unrevised CoFO", Exhibit 44B) and Altered Certificate of Occupancy ("Altered CoFO", Exhibit 44C) and the decisions made therein by the Department of Consumer and Regulatory Agency's ("DCRA") Zoning Administrator ("ZA").

ANC 6B timely filed an appeal of the Original Permit on June 30, 2021. The Board of Zoning Adjustment ("BZA" or "Board") granted ANC 6B's motion to amend the appeal on October 6, 2021, to include the First Revised Permit, Unrevised CoFO, and Altered CoFO (Exhibit 53).

The subject property is located at 1323 E Street SE (Square 1043, Lot 0166), in the borders of ANC 6B. The property is completely within the PDR-1 zone.

The Original Permit was issued on May 5, 2021. The First Revised Permit was issued on August 9, 2021. The Unrevised CoFO was issued on August 23, 2021. The Second Revised Permit was issued on September 14, 2021. The Altered CoFO was first made available to the public via DCRA's filing in Exhibit 42 on September 24, 2021. The building code use is unchanged as Mercantile use. The underlying zoning use in the Original, First, and Second Revised Permit and Unrevised CoFO was Production, Distribution, and Repair. The Altered CoFO changed the zoning use is Retail.

The owner of the Property is E Street Phonix LLC (“Property Owner”)¹. The lessee of the property is DoorDash Essentials LLC (“Lessee”)².

Permit Timeline

May 5: DCRA issues Original Permit (Exhibit #3). Within this permit, the Zoning Administrator determines that the property is required to provide one loading berth and three parking spaces. ZA further determines that the property owner is providing one loading berth and four parking spaces.

May 21: ANC 6B meets with DoorDash on site to discuss loading and parking issues, first notifying DoorDash of the deficiencies in the loading and parking.

May 24: ANC 6B first notifies the ZA of errors in his determinations related to the Original Permit.

June 10: DCRA’s Zoning Technician Tarek Bolden notifies ANC 6B “In consultation with the ZA he believes that must provide these features. However, **we are all in agreement that the existing features do not meet the zoning standard.**” (Emphasis added)

June 24: Lessee paints parking space lines in front of building, encroaching onto public space. ANC 6B immediately notifies ZA of this encroachment.

June 29: Lessee asserts to ZA that painted lines do not encroach onto public space despite extensive survey history suggesting otherwise and not providing a plat to document this assertion (Tab B)

June 29: ANC 6B timely files Original Statement (Exhibit #23) appealing the Original Permit alleging, inter alia, that the property cannot provide a zoning compliant loading berth or parking spaces that meet the size requirements set forth in Subtitle C, Chapters 7 and 9 of the Zoning Regulations. This filing also included a robust survey history showing the dimensions from the building façade to the property line (Exhibits #19, 20, and 22).

July 2: DCRA updates ANC on status of the permit stating: “At this time the representatives of the Doordash have informed us that they will be submitting a revision to permit #B2103902 to revise the parking layout to show the **required zoning compliant parking** in the front of the building. This revision **will include a surveyor's plat** showing the layout, size of the spaces and the property line.” (Emphasis Added, Exhibit 44D)

July 6: Property Owner files First Revised Permit with incorrect dimensions on the property’s site plan (Exhibit 44E) and Cover Page (Exhibit 44F). The site plan included with the First Revised Permit states that the front of the building is 26 feet from the property line, and that the site would have one parking space with a depth of 18 feet, as well as three parking spaces with depths of 17 feet. However, previous surveys of the lot (Exhibit #19 and 20) and the adjacent lots (Exhibit #22), provided to the Lessee before

¹ The Property Owner is identified as E Street Phoenix by the Office of Tax and Revenue and in DCRA’s Corporate Filings. However, the ZA and DCRA’s Permit Office continues to reference these permits under E Street Phonix. Nonetheless, John Weintraub has been identified as the managing partner regardless of the spelling and there appears to only be one entity related to this property.

² Prior filings had referred to the Lessee as “DoorDash”. As of filing the Second Revised Permit, the Lessee’s name was changed to “DoorDash Essentials LLC”

the permit was filed, all show that the front of the building is between 24 feet and 24 feet-7 inches from the property line.

August 9: DCRA approves the permit drawings and First Revised Permit Issued. The First Revised Permit did not include a plat. The Zoning Administrator makes new determinations

*"EXISTING CONDITIONS: 1 EXISTING, NONCONFORMING LOADING BERTH MEASURING 12' x 26' AND ONE LOADING PLATFORM MEASURING 10' x 10'"

*"2 REQUIRED PARKING SPACES (1 REQUIRED @ 9' X 18 AND 1 ALLOWED @ 8' 16' PER SUB C. SEC. 712.3"

*"EXISTING CONDITIONS: 4 EXISTING PARKING SPACES (1 @ 9' x 18' and 3 @ 9' x 17')"

August 11: ANC 6B notifies ZA of material misrepresentations in the First Revised Permit as well as a failure to provide a plat as required.

August 23: DCRA issues Unrevised CofO despite the issues raised by ANC 6B related to material misrepresentations in the First Revised Permit as well as lacking a plat. However, Lessee does not begin operations. The Unrevised First CofO when issued was for "STORAGE WAREHOUSE – DOOR DASH" (Exhibit 44B)

August 27: DCRA send weekly email to ANC 6B (Exhibit 44G) noting CofO was issued for "STORAGE WAREHOUSE – DOOR DASH"

August 30: DCRA Issues Notice to Revoke Unrevised CofO for use as "STORAGE WAREHOUSE –DOOR DASH" (Tab C)

August 31: Lessee performs survey on property, showing incorrect measurements on First Revised Permit (Tab D)

September 9: Lessee responds to Notice to Revoke challenging necessity of providing a plat yet providing a plat showing the site plan on the First Revised Permit differs materially from the survey (Tab E)

September 10: Property Owner applies for Second Revised Permit B2112156 captioned "Revising permit B2109853 to include updated survey, building plat and site plan."

September 14: ZA notifies ANC 6B it has issued Notices to Revoke the Original Permit, Revised Permit, and Unrevised CofO but notes that he is allowing Property Owner to satisfy undisclosed conditions to reverse this notice (Exhibit 44H). ZA further notifies ANC 6B that the Property Owner has responded to the notice with new information and an application to revise the series of permits.

September 16: DCRA issues permit B2112156 ("Second Revised Permit", Tab A) as a revision to the First Revised Permit. This permit includes the following determinations made by the ZA on the Second Revised Permit Cover Page (Tab F) and Site Pan (Tab G):

"4 EXISTING NONCONFORMING SPACES: 1 @ 15.76' AND 3 @ 14.98' IN LENGTH"

September 23: Nine days after the application for the Second Revised Permit was accepted as complete and only after alerting DCRA that ANC 6B was moving to expand the appeal (Exhibit 44I), DCRA finally

provides related documents to Second Revised Permit to ANC 6B at 7:57 PM (Exhibit 44J). These documents contain the Altered First CofO approving retail use.

October 12: Lessee begins operations at 1323 E Street SE, providing delivery drivers instructions that they may park in public space and delivery with vehicles up to 36 feet in length (Tab H). Immediately, deliveries to the property begin blocking the sidewalk and adjacent bike lanes (Tab I)

Property History

The property is improved with a 5,000 square foot warehouse with a 790 square foot habitable mezzanine. The building was originally constructed in 1960, after the adoption of the first Zoning Regulations in the District of Columbia and was conforming to the regulations regarding parking and loading requirements. The property was zoned C-M-1 and maintained that zoning until the adoption of the 2016 Zoning Regulations when it was renamed to PDR-1. The building is set back 24 feet from the front property line, allowing for parking in the front yard as allowed in the C-M-1/PDR-1 zone. The building provided a zoning-compliant loading berth (Exhibit 19) and required two parking spaces for warehouse use when constructed.

At some point before 1983, a garage door to access the interior of the building was built near the eastern edge of the southern wall (Tab H). In 1983, building permit B297967 ("1983 Permit") was issued to remove the existing loading door and to alter the interior layout to use the building as an auto repair facility (Exhibit 47). Notably, DCRA at the time stamped the 1983 Permit with "THIS PERMIT DOES NOT AUTOHORIZE CROSSING SIDEWALK WITH TRUCKS" (Exhibit 48, Page 5). On February 7, 1984, Certificate of Occupancy B137647 ("1984 CofO") was issued to change the use of the building from retail to auto repair and use 5,500 square feet (Exhibit 13). At the time, Auto Repair use was classified as "Service, Retail" and required 14 parking spaces³, which were provided both inside the building and in front of the building. The zoning compliant loading berth was abandoned as this time, despite the zoning regulations requiring a loading berth. The configuration of this building was unchanged until 2013.

On August 19, 2013, Building Permit B1309096 ("2013 Permit", Exhibit 10 Page 1) was issued to the current Property Owner to install an accessible ramp in the front of the building, using the abandoned loading platform as a landing to enter the store. When this ramp was built, the distance from the front of the ramp to the property line was reduced to approximately 15', preventing zoning-compliant parking to be provided in this area (Exhibit 10, Page 33). On November 15, 2013, the current Property Owner applied for Certificate of Occupancy CO1400457 ("2013 CofO") to use 4,000 square feet of the building as a retail store, notably checking "No" to the question "Is off-street parking on the property provided for this use?" (Exhibit 17). 4,000 square feet of occupancy also did not require a loading berth and none was provided since the loading berth had been long abandoned. On November 21, 2013, DCRA Issued the 2013 CofO to use 4,000 square feet of the building (Exhibit 17)

Errors Made by Zoning Administrator and Analysis of Timeliness

Loading

³ Up until December 1984 with the issuance of a final rulemaking related to case 82-5, "repair garage" was not present in the zoning regulations related to parking and loading requirements. The 1984 CofO provided for 5,500 square feet of usage. Zoning requirements were 1 space per 250 square feet of gross floor area over 2,000 square feet.

1) The ZA has determined than an existing non-conforming loading berth exists at the property. However, this loading berth was clearly abandoned in the 1983 Permit and 1984 CofO and is no longer being provided. The claimed loading berth is a purpose-built garage door as evidenced by the 1983 Permit being stamped "THIS PERMIT DOES NOT AUTOHORIZE CROSSING SIDEWALK WITH TRUCKS". A lawfully existing non-conforming loading berth simply does not exist, as required by C-201.2, as it was abandoned with the issuance of the 1984 CofO.

Timeliness: The determination of an allowable nonconforming loading berth appears first in the First Revised Permit and this allegation was made in the First Revised Statement

2) Even if the BZA determines the claimed loading berth was not abandoned in 1984, the Property Owner further abandoned the existing non-conformity on or about November 21, 2016, three years after DCRA issued him the 2013 CofO for retail use of 4,000 square feet of the property. Retail use of less than 5,000 square feet did not require a loading berth per ZR58 2201.1 and no loading berth or platform was identified on the application or drawings for the 2013 Permit (Exhibit 9) or 2013 CofO (Exhibit 17). The property owner abandoned this existing non-conformity three years after the issuance of the 2013 CofO per C-204.4⁴. Photos from the time the Property Owner was operating Frager's Hardware show the claimed loading berth was blocked by an accessible parking space and dumpster further showing discontinuance of the claimed non-conformity (Tab J, Page 3)

Timeliness: The determination of an allowable nonconforming loading berth appears first in the First Revised Permit and this allegation was made in the timely filed First Revised Statement

3) The First Revised Permit carries forward the determination from the Original Permit that the existing loading meets all dimensional and loading requirements *except for the two-dimensional size (12' x 24')* while also noting a 10'x10' loading platform is being provided. There are multiple errors by the ZA in this determination. In the Original Statement, ANC 6B alleged errors detailing the failures to comply broadly with the provisions of C-907. The ZA's changing determination in the First Revised Permit makes moot some of the allegations in the Original Statement. However, ANC 6B continues to allege specific errors in layout and size requirements. Specifically, the proposed loading berth does not meet the dimensional requirements in place at the time the loading berth would have been put into service with the 1984 CofO. At the time, the loading berth was required to be 12 feet wide and 10 feet of vertical clearance (ZR 58, 7303.4, Tab I). The loading berth door is neither 12 feet wide nor 10 feet tall as required. None of the permits conveniently provide measurements of height or width of the loading berth door, but the failures can be seen in the First Revised Permit's Site Plan (Exhibit 44E) which make clear the width of the loading berth door is approximately the size of the loading platform, which is 10 feet wide. Multiple photos in Exhibit 25, especially Page 6, show the loading berth door is approximately the height of a work van, well below the required 10 feet. Again, these dimensions were not provided by the Property Owner or Lessee in any of the permit or certificate of occupancy documentation and must be provided in compliance with the zoning regulations.

⁴ A nonconforming use that is discontinued for any reason for a period of three (3) years or less shall be allowed to resume operation provided there was no intervening conforming use, there are no changes to the nonconforming use, and it conforms with Subtitle C § 204.1.

Timeliness: The determinations have not changed from the Original Permit and the errors were alleged in the timely filed Original Statement and thus this allegation is timely.

4) The ZA has determined that a loading platform of 10'x10' is being provided. The claimed loading platform, which slopes downward about three feet, does not meet the requirement to be horizontal⁵ in C-905.4(d)⁶. This slope is noted in Exhibit 44E.

Timeliness: The determination that a loading platform is being provided first appeared in the First Revised Permit and thus this allegation is timely.

Parking

5) The ZA's new determination in the Second Revised Permit that the parking spaces in front of the property are "existing non-conforming spaces", three with a length of 14.98' and one with a length of 15.76', is erroneous. The ZA has erred in this determination faultily relying on C-201.2 for the presence of **lawfully** existing nonconformities. Up until the issuance of the 2013 Building Permit, the property provided only zoning-compliant parking spaces in the front of the building (Exhibit 19) as well as in the interior of the building (Exhibit 47). The Property Owner, in 2013, installed an accessibility ramp at the front of the store which made the parking spaces non-compliant without BZA relief. Only the Board of Zoning Adjustment may grant relief to the dimensional requirements of parking spaces via special exception per C-712.11.

Timeliness: This determination that the parking spaces in front of the building were existing nonconformities was first made in the Second Revised Permit

6) Even if the BZA agreed that a Property Owner's actions to make parking spaces non-conforming somehow allowed the spots to becoming lawfully existing non-conformities, the application for the 2013 CofO made clear the Property Owner was abandoning all parking spaces on the property, clearly checking "No" to the question "Is off-street parking on the property provided for this use" (Exhibit 17). C-204.6 is clear that the Property Owner abandoned these non-conformities, assuming they ever existed in the first place.

Timeliness: This determination that the parking spaces in front of the building were existing nonconformities was first made in the Second Revised Permit

CofO

7) The Unrevised First CofO (Tab B) was altered by DCRA after issuance and contains a factual impossibility and should be revoked. On August 20, the ZA approved CO2102980 for use as "STORAGE WAREHOUSE—DOOR DASH" (Exhibit 44B and 44G). When DCRA filed Exhibit 42, they included the Altered First CofO (Tab C). The Altered First CofO, with an issuance date of August 23, 2021 is claimed to be based on "ASSOCIATED PERMITS B2103902, B2109853, B2112156". However, B2112156, an Alteration and Repair Permit, was not even filed with the DCRA until September 10, 2021 (Exhibit 44J). It

⁵ "Horizontal" is not defined in B-100.2, however the Zoning Regs in at least one place mention "horizontal or near-horizontal" related to vegetated roofs in B-100.2. This reference makes clear that horizontal means parallel or flat. Merriam Webster defines as "parallel to, in the plane of, or operating in a plane parallel to the horizon or to a baseline"

⁶ A loading platform floor shall consist of one (1) horizontal level.

should be impossible for DCRA to issue a Certificate of Occupancy based on a permit that doesn't exist. C-302.4 makes clear "If a building permit application for the erection or alteration of a structure is submitted, a certificate of occupancy for that structure shall not be issued until the erection or alteration is completed to the point of availability of occupancy for use, except as provided in Subtitle A § 302.5". An alteration permit not even issued, let alone applied for, cannot be the basis for issuing a CofO.

Timeliness: First Writing of this Decision is unknown, but ANC contends it would be when DCRA filed Exhibit 42 on September 23 as the Altered First CofO was not available through any normal means until it was provided. This allegation of error was made in the First Revised Statement.

Use Misclassification

8) Up until the issuance of the Altered First CofO, the project was continuously classified as a storage/warehouse establishment. On March 19, 2021, in the response to comments from the ZA indicating the proposed use would be classified as "distribution and office", the Lessee did not disagree with that proposed use (Exhibit 7). On June 14, 2021, when the First Revised Permit was filed, the project was described as a "[S]torage facility for convenience store items that will be distributed by DoorDash." When the Unrevised First CofO was issued, it was captioned as "Storage Warehouse—DoorDash". While this history of determinations by the ZA and representations by the Lessee are not conclusive as to misclassification of use, when combined with the use regulations it is impossible to conclude otherwise.

The ZA erred specifically in not classifying this use as Production Distribution and Repair as defined in B-200.2(z)⁷ which specifically includes "warehouse", "storage", "distribution", and "goods intended to wholesale". The ZA's determination that this is a retail establishment is undone by the use definition of "retail" in B-200.2(bb). Going line by line:

(1) A use engaging primarily in the on-site sale of goods, wares, or merchandise directly to the consumer or persons without a resale license;

The proposed DoorDash DashMart has advertised itself through the sale of goods through its app and delivery to consumers via third-party businesses (usually independent contractors). These independent contractors do not decide what they want to buy and deliver, they are simply an individual distribution enterprise. Per the updated site plan (Tab G), customers or distributors are not allowed in store to

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Production, Distribution, and Repair:

- (1) A use involving the on-site production, distribution, repair, assembly, processing, or sale of materials, products, technology, or goods intended for a wholesale, manufacturing, or industrial application;
- (2) Uses may include firms that provide centralized services or logistics for retail uses, and wholesale goods establishments commonly selling to businesses in bulk. These uses typically have little contact with the public;
- (3) Examples include, but are not limited to: manufacturing facility, concrete plant, asphalt plant, material salvage, hauling or terminal yard, chemical storage or distribution, outdoor material storage, acetylene gas manufacturing, fertilizer manufacturing, rock quarrying, warehouse, storage, self-storage establishment, ground shipping facility, or wholesale sales; and;
- (4) Exceptions: This use category does not include uses which more typically would fall within the retail, service, or waste-related services use categories;

browse merchandise and no in-store purchasing is offered noting the lack of Point of Sale systems in the plans.

(2) These uses include goods commonly sold to individuals in small quantities for their direct use;

The proposed DoorDash DashMart has promoted itself not for sales to customers but rather to customers whose goods will be delivered by independent businesses. In fact, consumers are not even able to browse goods at the store, instead being forced to purchase goods through an app.

(3) Examples include, but are not limited to: shop, appliance, computer, drug, jewelry, fabric, department, large format, or grocery stores; clothing or gift boutiques; or pawn and antique shops; and

(4) Exceptions: This use category does not include wholesale goods commonly sold to businesses in bulk, corner store use, or uses which more typically would fall within the arts, design, and creation; eating and drinking establishments; automobile-related; firearm sales; marine; production, distribution, and repair; or sexually-oriented business use categories;

The proposed DashMart is not mainly engaged in the business of selling to individuals, they are in the business of wholesaling goods to independent delivery businesses.

The ZA has not provided his analysis under B201.5 nor has information been presented in public documents to the ZA stating how the use is properly classified as retail.

Timeliness: ANC 6B contends the First Writing of this determination is September 23, when DCRA served the ANC Exhibit 42. There is a documented history of the original CoFo being issued for Storage and Warehouse until Exhibit 42 was filed.

Timeliness

This Original Permit was issued on May 5, 2021. ANC 6B passed a resolution on June 8, 2021 to file this appeal allowing for the authorized representative to amend the appeal when revised permits or a certificate of occupancy was issued. ANC 6B filed the Original Statement on June 30, within 60 days of the issuance of the Original Permit. The First Revised Permit was issued on August 9, 2021. The original CoFo was issued on August 23. ANC 6B filed their First Revised Statement and associated motion to amend the appeal to include the First Revised Permit and Unrevised and Altered CoFo on September 24, well within the 60 days of the first writing of the determinations in the First Revised Permit and Unrevised and Altered CoFos. The Second Revised Permit was issued on September 16, 2021. To hopefully allow a hearing on December 1, 2021, this updated Statement of Appeal with a motion to include the Second Revised Permit was filed on November 2, 2021, well within 60 days of the determinations in the Second Revised Permit. ANC 6B will file a prehearing statement no later than November 24 including references to case law⁸ and presented in a coherent manner.

⁸ The case law relied on for this appeal include West End Citizens Association v. District of Columbia Board of Zoning Adjustment (2015) and Rodgers Brothers Custodial Service, INC. v. District of Columbia Board of Zoning

How ANC 6B Will Prove Their Case

Appellants will prove the errors made by the zoning administrator through the following methods:

- 1) Analysis of the Zoning Regulations
- 2) Testimony and photographic evidence on past use and alterations to the property
- 3) Expert testimony on the requirements for parking and loading and provisions relates to existing non-conformities
- 4) Current Building Permit Plans
- 5) Historic Certificates of Occupancy and Certificate of Occupancy Applications
- 6) Historic Building Permits, Building Plans, and Building Permit Applications
- 7) Documents from the Surveyor's Office (Subdivisions, Wall checks, A&T lot creation)
- 8) Communications between ANC 6B and the Zoning Administrator's Office
- 9) Communications between DCRA and Lessee, obtained via FOIA Request

Conclusion

ANC 6B reiterates its long-standing public position that this use here simply isn't allowable by right because the zoning-compliant parking spots and loading berth were removed at this property and are no longer able to be provided. The zoning regulations are clear, only the BZA may grant relief to the number or dimensions of parking spots and loading berths. We stand by ready to work with the Lessee, the Property Owner, and the District Department of Transportation as a party in a Special Exception application waiving these parking and loading requirements to create a viable use for the Property Owner and Lessee with appropriate impact mitigations enforceable by DCRA.

As the chair of ANC 6B's Planning and Zoning Committee, I attest that the zoning allegations are accurate.

Respectfully



Corey Holman, Authorized Representative of ANC 6B
Chair, ANC 6B Planning and Zoning Committee

Adjustment (2004) related to the primacy of Certificates of Occupancy in determining use and nonconformities related to using less than the full gross floor area and non-conformities.

I certify that on November 2, 2021, a copy of ANC 6B's Motion to Append Appeal 20549 was served via e-mail to the following persons:

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Corey Holman, Authorized Representative of ANC 6B
Chair, ANC 6B Planning and Zoning Committee

Enclosures:

Tab A: Second Revised Permit

Tab B: Lessee's asserting that parking space lines are not in public space, obtained via 2021-FOIA-0804

Tab C: Notice to Revoke permits, obtained via 2021-FOIA-0804

Tab D: Updated Survey of 1323 with correct parking space and loading berth dimensions

Tab E: Lessee's response to Notice to Revoke, obtained via 2021-FOIA-0804

Tab F: Second Revised Permit Cover Sheet

Tab G: Second Revised Permit Site Plan

Tab H: Flyer provided to resident showing the loading plan for operations, showing loading in public space

Tab I: Photos of blocks sidewalks since Lessee has begun operations

Tab J: Historic photos showing the garage door use before 2013

Tab K: Loading Regulations valid in 1984, provided in the case record for Zoning Commission case 82-5

Tab L: Update on Board-directed ANC 6B discussions with Door Dash